No._____

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October 1989 Term

United States Supreme Court

* * *

Sam Ferris
Petitioner
-vs-
County of Santa Clara, et. al.
Defendants

* * *

On Petition for Writ of Certiorari to the
United States Court of Appeals - Ninth Circuit

* * *

Petition for Writ of Certiorari

* * *

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1. QUESTIONS PRESENTED

All questions [except 1 & 20 - 28] are Constitutional Challenges to Sections 261.5 and 288a(b)1&2 of the California State Penal Code. They are Federal Constitutional Challenges to the three laws on their face. PC § 261.5 is the California Statutory Rape Law prohibiting sexual intercourse with teenaged females aged 17 and under and PC § 288a(b)1&2 prohibit, in pertinent part, consentual oral copulation with teenagers aged 14-17. Question 7 is only applicable to 261.5. This case does not in any way challenge any laws prohibiting sexual contact with those under 14, or if anyone perceives a difference, with those aged under 15. The alleged female victims were 15 1/2 and 17 1/2 at the time of the alleged offenses, of the 30 year old male Sam Ferris.

The words Privacy below invokes the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States of America.

The words Equal Protection, Due Process or Vagueness below invoke the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

The words Cruel and Unusual below invoke the Eight Amendment to the Constitution of the United States of America.

Questions 9 and 21 also invoke considerations under the First Amendment to the Constitution of the United States of America.

For Clarity I note when the issue was first brought up in parentheses at the end.

(Com); First Amended Complaint.

(State); Passed on in the State Courts after abstention then Writ Denied in the United States Supreme Court then brought up at Summary Judgment in the District Court.

(Fed) Not Passed on in the State Courts, but were in the Denied Writ in the United States Supreme Court then brought up at Summary Judgment in the District Court.

(Now); Brought up now after the Ninth Circuit Decision.

1.1 Elected Judges

Are Defendants Due Process Rights violated by having his case decided at the State Level by Elected Judges that may not be totally impartial due to the Election Process? Quod constat clare non debet verificari. (State)

1.2 Irrebuttable Presumption

The Sam Ferris Irrebuttable Conclusive Law Challenge: Can a State, as a function of its police power, enact laws that contain conclusions that could not be said with substantial assurance are true in all instances, without denying Defendants Due Process Rights? This is better known as an irrebuttable presumption challenge but against general presumptions contained in the law and not evidentiary ones. This challenge also includes the normal Irrebuttable Presumption challenge. (Com)

1.3 Adult Privacy

Are these laws repugnant to the Federal Right of Privacy of the Adult? This includes fundamental "home/bedroom" privacy considerations, associational privacy rights, and procreative privacy rights. As well as fundamental privacy rights to engage in consentual sexual activates with those females between 14 and 18 that are genuinely able to offer consent. It also encompasses normal rights to engage in sex with partners 14 and over that has ancient roots [from 1275 to 1897] when such activity was legal under our laws. This would cause transgression of Due Process and Judicially Interpreted Privacy rights. (Com)

1.4 Teenagers Privacy

Are these laws distasteful to the Federal Right of Privacy, to Judicially Interpreted Procreative rights of the teenager, and the Privacy right of the teenager to engage in sexual activates free of State investigative intrusion, without a potential chilling effect on partners who fear criminal prosecution? Succinctly stated: Just how old does a citizen have to be before they have they same normal sexual privacy rights that adults enjoy? This also would infringe upon the Adult Partners Due Process Rights. And this also encompasses the Equal Protection right of the teenagers not to be discriminated against on the basis of age to monetarily profit from their endeavors. (Com)

1.5 Vague in Sentencing

Are these laws Unconstitutionally Vague, and thus in violation of the Due Process, and Cruel and Unusual Punishment provisions of the Federal Constitution, in their Sentencing Mandates? (Com)

1.6 Consent/Intent

Are these laws irrational in that they hold that teenagers cannot consent to sexual activates yet in California teenagers can be prosecuted for sexual criminal activity and held to have intent to violate sex laws. How can teenagers be intelligent enough to have intent but unintelligent enough to consent? This irrationality would be violative of the Due Process and Judicially Interpreted Privacy protections of the Federal Constitution. (Com)

1.7 Equal Protection

Is PC § 261.5 a Defilement of Equal Protection in that Females cannot be charged with its violation? Consentientes et agentes pari poema plectentur. (Com)

1.8 Laws Vague/Unconstitutional

Are the laws Vague in that they are so infested with potential Unconstitutionality that no one can know if they are Constitutional or not? This would also be infractagory of both Due Process and Cruel and Unusual Punishment. This can be also stated as a "Mistake of Law" defense if these are specific intent crimes. (State)

1.9 Invidious Prosecution

Considering that no one in the State of California has ever been charged with a Pure violation of these laws except me, is my prosecution Discriminatory and Invidious, and thus violative of Equal Protection guarantees? (Com)

1.10 Equal Protection State to State

Is it an Equal Protection violation to have the State of Arkansas set its Statutory rape age at 11 and California to set it at 18? (Com)

1.11 Written Opinion

Is it a Due Process or Equal Protection breach to not provide written decisions before plea-bargaining? (State)

1.12 Published Opinion

Is it a Due Process or Equal Protection violation to not provide published opinion, at the state level, especially in first impression cases. (State)

1.13 Equal Protection Married/Unmarried

Is it an Equal Protection violation to arrest those individuals who violate the laws in question but not those similarly situated individuals who engage in sex with their Teenage Spouses? (State)

1.14 Equal Protection Under 18/Over 18

Is it an Equal Protection violation to arrest those individuals who violate the laws in question but not those similarly situated individuals who engage in sex with partners 18 and Over? (State)

1.15 Teenagers can Consent to Many Activities

Is it Unconstitutional under Due Process, Equal Protection and Fundamental Privacy Rights to allow teenagers to consent to numerous medical practices at age 12 but not to allow them to consent to sexual activates? Concordare leges legibus est optimus interpretandi modus. (State)

1.16 Mature Minors

Are the teenagers in question "mature minors" under Judicial Interpretation of the Federal Constitution pursuant to Privacy, Due Process and Equal Protection and thus able to consent to sexual activates? (State)

1.17 Cruel and Unusual if Mistake of Law

Is it Cruel and Unusual Punishment in general to Punish someone who honestly felt his actions were legal, in that the laws were/are Unconstitutional? (State)

1.18 Cruel and Unusual Sentence

Is 3 years in State Prison Cruel and Unusual Punishment for a single violation of the laws in question? (Fed)

1.19 Cruel and Unusual Invidious Punishment

Is it Cruel and Unusual Punishment to punish *only* me for a Pure violation of the laws in question, and not the other 60-95% of the population who has, at one time or another, also violated these laws? Consuetudo vincit communem legem. (Fed)

1.20 Payment for Indigent Pro Pers

Should an indigent defendant, under Due Process and Equal Protection be entitled to fair monetary enumeration for work he is required to put in when his Court appointed public defender refuses to file non-frivolous appeals? Especially where the work is substantial, as this case, and where at least one issue is not only non-frivolous but Reserved by this very Court. Even if the appeal is not won, but is taken in good faith and is clearly not frivolous, as this case so far. Justitia debet esse libera, quia nihil iniquis venali justitia. (Fed)

1.21 Private Prostitution

Are laws that prohibit *private* prostitution, for example where a female sells her services to a bed-ridden male (through injury or some such cause), or out-call type operations, or the normal bartering where a female asks to be taken out to supper in exchange for sex, Unconstitutional, on Privacy, Due Process and Equal Protection grounds? (Fed)

1.22 Bar Examination

Is the law that prohibits any citizen from taking the bar examination Unconstitutional under the Due Process or Equal Protection covenants of the Federal Constitution? (Fed)

1.23 Denial of Jus Tertii Standing

Is the Ninth Circuits' denial of Jus Tertii Standing on the issue of the Minors Privacy right a Due Process violation because a defendant in a state criminal case *always* has standing to make a constitutional challenge on *any* issue that would result in the reversal of his conviction. (Now)

1.24 Not allowing incorporation of points

Is the Ninth Circuits' apparent holding that points raised in the state court (and at the United States Supreme Court level) could not be incorporated by reference into the summary judgment motion a Due Process violation. (Now)

1.25 No Summary Judgment Made

Is the fact that the County of Santa Clara did not renotice their summary judgment motion, apparently so that Ninth Circuit would hold that issues raised in State Court were not raised below at the District Court level, a Due Process violation in that it kept argument off the record that if made would have required the Ninth Circuit to pass on the issues? (Now)

1.26 Two Amended Complaints for Pro Pers

In light of the fact that court decisions have held that the Federal Rules of Civil Procedure Rule 15 should be "liberally construed" when dealing with Pro Pers, should Pro Per's *always* be allowed two amendments to the complaint rather then the standard one allowed to litigants represented by counsel as a Due Process constitutional issue? (Now)

1.27 Lack of Hearing

Is it unconstitutional under Due Process to deny a criminal defendant the right to challenge, with a hearing, an irrebuttable presumption that terminates a fundamental constitutional right? (Now)

1.28 Judgment Without Discussion

Is it unconstitutional under Due Process or Equal Protection for a Federal Appeals Court to issue an opinion that disagrees with previous Supreme Court decisions, Other Circuit decisions, and panels of the same Circuits decisions all *without discussion* of the previous cases that were brought to the attention of the Appeals Court by the losing litigants. (Now)

1.29 Refusal to add Plaintiff for Standing

Is it a denial of Due Process for a Federal Appeals Court to deny the addition of a plaintiff, for standing purposes, at any stage of the proceedings, if such addition changes or raises no new fact issues and does not prejudice the other party. (Now)

2. Parties Below

Plaintiff

Sam Ferris, Pro Se, 3908 Arden Farms Place, San Jose, California 95111. (408) 578 - 3579.

Defendants

1) County of Santa Clara; Donald L Clark, James Rumble, 9th Floor East Wing, 70 West Hedding Street, San Jose, California 95110, (408) 299-2111

2) City of San Jose and Officers; Robert J. Logan, Office of the City Attorney, 151 West Mission Street, San Jose, California 95110 (408) 277-4924

3) State of California; Paul D. Gifford, Michael Buzzell, 6000 State Building, San Francisco, California 94102 (415) 557-0311

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3.1 APPENDIX

A: PUBLISHED FINAL OPINION OF THE NINTH CIRCUIT COURT OF APPEALS

B: ORDER OF THE NINTH CIRCUIT BEING APPEALED DENYING ADDITION OF STATE COURT PROSECUTRIX AS A PLAINTIFF FOR STANDING

C: ORDER OF THE NINTH CIRCUIT DENYING REHEARING

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4.4 State Statutory Provisions

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5. OPINIONS BELOW

The published opinion of the Ninth Circuit is annexed as Appendix A. The November 1st, 1988 Order Denying the addition of Brenda Asbill (the 15 year old State Court prosecutrix/victim) as a plaintiff and is annexed as appendix B. These are both the Judgments being appealed from.

6. JURISDICTIONAL GROUNDS

The Final Judgment in this case was filed by the Ninth Circuit Court of Appeals, in published opinion, on December 6th, 1989.

The timely petition for rehearing and En Banc Review was served on December 18th, 1989.

The denial of the petition for rehearing and En Banc Review was filed on March 16th, 1990.

Jurisdiction is conferred upon this court by Title 28, United States Code, Section 1254(1).

7. CONSTITUTIONAL AND STATUTORY PROVISIONS

The provisions of the United States Constitution; First, Fourth, Fifth, Eight, Ninth and Fourteenth Amendments should be memorized verbatim by now. The Federal Statutory provisions; 42 U.S.C. § 1983, and 28 U.S.C. § 1254 (1) need not be repeated here. The State Statutory Provisions follow:

7.1 California Penal Code Section 261.5

Unlawful sexual intercourse is an act of sexual intercourse with a female not the wife of the perpetrator, where the female is under the age of 18 years.

7.2 California Penal Code Section 264

...Unlawful sexual intercourse, as defined in section 261.5, is punishable either by imprisonment in the county jail for not more than one year or in the state prison.

7.3 California Penal Code Section 288a(b)1

Except as provided in Section 288, any person who participates in an act of oral copulation with another person who is under 18 years of age shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year.

7.4 California Penal Code Section 288a(b)2

Except as provided in Section 288, any person over the age of 21 years who participates in an act of oral copulation with another person who is under 16 years of age shall be guilty of a felony.

Those reading the above for the first time might attempt to guess at what the sentencing mandates are (i.e. the maximum term of incarceration for a single violation of the above laws) and keep that in mind when considering the Vagueness question.

8. FACTS OF THE CASE

8.1 State Criminal Procedure

In 1984 the Petitioner Sam Ferris, who had no previous criminal record, (Hereafter "Sam" or "Ferris"), 30 year old male (at the time), Plaintiff, was arrested and ultimately charged with violations of California State Penal Code § 288(a)(b)1, 288(a)(b)2 and 261.5 (statutes prohibiting in pertinent part Consentual Oral Copulation and Intercourse with females aged between 14 and 17). The charges involved Brenda Asbill (hereafter "Brenda"), a 15 1/2 year old female, (at the time of the charged acts) and Kathy Worth a 17 1/2 year old female (at the time). Sam was convicted upon his plea of Nolo Contender as to all charges with a "six month maximum" plea bargain. He served two months in jail total after a sentence modification.

On October 19, 1984 Ferris filed a PC § 995 motion denied in Superior Court and then on December 10th, 1984 the Sixth District Court of Appeals denied his petition for a Writ of Prohibition (PC § 999a) and then on January 2, 1985 the California Supreme Court denied his petition for review, of the 995 denial.

On January 9th, 1985 Ferris changed his plea to Nolo Contendere on the condition he be granted probation. He stipulated to his conduct with Brenda A., but refused to agree the preliminary examination produced evidence of the counts with Kathleen. The court reviewed the transcript and determined there was a factual basis for the plea as to Kathleen.

On March 20, 1985 the Federal District Court Stayed the companion 42 U.S.C. § 1983 suit pending exhaustion of State remedies.

On March 12, 1985 Ferris was granted probation and ordered, inter alia, to serve six months in county jail for his victimless crimes.

On May 2nd, 1986 The Sixth District Court of Appeals, unanimously with written but unpublished opinion Affirmed the Judgment in the face of numerous constitutional challenges to the laws on their face.

On May 16th, 1986 Ferris Petitioned for Rehearing and Publication, both Petitions were denied on May 23rd, 1986 by the Sixth District Court of Appeals.

On July 16th, 1986 The Supreme Court of the State of California denied Ferris' Petition for Review and Publication.

On August 11th, 1986 The Sixth District Court of Appeals finalized the May 2nd, 1986 Opinion by issue of a Remittitur over appellants motion to Stay.

On November 10th, 1986 Certiorari was denied by the United States Supreme Court, on Writ to the Sixth District Court of Appeals for the State of California (Case # 86-5537).

8.2 Federal Civil Procedure

Plaintiff reserved his right to a Federal Forum by disallowing the State Courts from passing on any Federal Claim. The local Federal District Court took that case after expiration of the Stay.

On July 14th, 1988 Sam lost in Federal District Court pursuant to Summary Judgment.

Sam then timely appealed to the Ninth Circuit and filed a motion to add Brenda as a Plaintiff to the case based upon the fact that she did not go to the Police initially and that it is her opinion that her privacy and other rights have been violated by the State Court prosecution of Sam.

On Nov 1st, 1988 The Ninth Circuit Denied the Motion to add Brenda as a Plaintiff.

Also on Nov 1st, 1988 the Federal District Court issued an opinion in another case in which the Ferris had made RICO claims against similar defendants, predicated upon the same Constitutional violations as reiterated in this case. Although the District Court had previously held that the two cases are not related the fact that the merits were reached in the other case may have some effect on this case.

On July 14th, 1988 Final Judgment was enter by the District Court.

A Timely Motion for Rehearing was filed in the District Court on July 25th, 1988.

The Motion for Rehearing was denied August 4th, 1988.

The Notice of Appeal was timely filed August 11th, 1988.

8.3 Federal Court Jurisdiction

8.3.1 District Court

Pursuant to the 42 U.S.C. § 1983 Cause of Action: The District Court has jurisdiction of this case under and by virtue of 28 U.S.C. § 1343.

Pursuant to the United States Constitutional Causes of Action (not yet allowed): General Federal Question: From Article Three § Two of the Federal Constitution: The judicial Power extend to all cases, in Law and Equity, arising under this Constitution,...

Pursuant to the Civil RICO Causes of Action (not yet allowed): This court has jurisdiction of this case under and by virtue of 28 U.S.C. § 1337(a), 28 U.S.C. § 1331 and 18 U.S.C. § 1964(c).

8.3.2 Ninth Circuit Court of Appeals

28 U.S.C. § 1291.

8.4 Merit Facts of the Case

This case is simply one of Ferris offering the females monetary enumeration to engage in sexual activates and them consenting. Examination of the record of the Preliminary Examination in State Court shows *none* of the following:

A. Coercion due to Status Relationship

B. Drugs or alcohol being involved in any manner

C. Sam being in a Noble position in the community

D. Prostitution in the sense of Sam as a pimp profiting monetarily from the teenagers work

E. Force or hint of Force

F. Pornography or pictures

G. Neither Female being infected with disease or made pregnant

The preliminary examination showed the following:

H. All acts occurred in the privacy of Sam's bedroom [which has no windows] and/or Sam's bed.

I. Both Females were contacted by the police and neither female nor her parents went to the Police.

Declarations filed by Brenda when she was 17 and again at 19 years of age, show:

J. Sam always used prophylactic contraceptives during the time of the alleged acts.

K. It is her opinion that her rights were violated by the State Prosecution of Sam.

9. WHEN FEDERAL QUESTIONS WERE FIRST RAISED

There is considerable argument over when the State Court issues were brought up.

There is no argument that Questions Presented above 1.2-1.7 & 1.9-1.10 were brought up in the First Amended Complaint. This was filed on 12-5-84 [#39 in the Record]. The Ninth Circuit mentioned all these issues except 1.6 in its opinion.

Issues raised above numbered 1.1, 1.8, and 1.11-1.17 were raised first in the State Courts after abstention by the District Court. They were then raised in the United States Supreme Court by a Writ of Certiorari (See case No. 86-5537) after loss in the State Courts. The Writ was denied on November 10, 1986. Issues numbered 1.18-1.22 were raised first in the Writ to the United States Supreme Court.

The Writ of Certiorari (titled "Jurisdictional Statement" but considered as a Writ) was sent to the district court on October 23rd, 1986 [#66 in the record "Received: Cover letter to the Clerk and attachments"].

It was then incorporated by reference in Plaintiff Ferris' motion for summary judgment on May 22nd, 1987.

The District Court did not pass on any of these issues and the Ninth Circuit then held that they were not raised below and did not pass on them, even though they were served on all parties, send to the district court and incorporated by reference into the Plaintiffs' summary judgment motion.

The rest of the issues, 1.23 - 1.28 are brought up first now. The reason for this is that they are constitutional violations brought about by the Ninth Circuit decision and thus could not be brought up sooner.

9.1 Most of the Footnote 8 Issues were <u>in fact</u> properly raised below

It is nonsense that issues above numbered 1.1, 1.8, and 1.11-1.17 should be tossed out when I raised them in state court and at Summary Judgment. 1.18-1.22 were raised at the Supreme Court and at Summary Judgment.

Following abstention I returned from the state court with issues that were not raised in the complaint. I then raised the issues in my motion for Summary Judgment.

From Morrison v. Char, 797 F.2d 752, 757 (9th Cir. 1986) (dissent):

> It is a well-settled rule that a party opposing a Summary Judgment motion must inform the trial judge of the reasons, *legal* or *factual*, why Summary Judgment should not be entered. If it does not do so, and loses the motion, it cannot raise such reasons on appeal. [many citations omitted].

It is *uncontroverted* from the record, that I brought in the additional state court arguments in during my motion for Summary Judgment. By the majority analysis in Morrison even if there is only a *factual* dispute about what issues were or were not raised in the motion for Summary Judgment then that in itself is sufficient to defeat my opponents motion for Summary Judgment. The facts are clear and in the record.

From Notice of Motion and Motion for Summary Judgment, May 22, 1987 (Record #68):

> This motion is based upon this notice of motion, the arguments herein raised, and all other papers and documents filed in this case to date, and any other oral or written argument, testimony or documentation submitted prior to or at the hearing on this motion.
>
> This matter is back in Federal Court upon the exhaustion of State Remedies (and then some) pursuant to Pullman abstention/Stay, as the State Courts only decided matters based on State Constitutional grounds there is no Collateral Estoppel, Res Judicata or Res Ajudicata on any Federal Constitutional Questions from the State Courts.

The merits of this case are obvious, and the latest arguments are found in: "United States Supreme Court Jurisdictional Statement-State Criminal Case", and "California State Supreme Court's Defendants/Appellant's petition for review" which are both rebuttals to the 6th District State Court of Appeals opinion. Both copies were filed in this court in Nov or Oct, 1986. They can be considered as the Points and Authorities in support of this motion.

Questions 1-18 listed on pages 3-6 of the United State Supreme Court Jurisdictional Statement are the subject of this motion.

The other questions (19-23) are tangential and can be optionally decided, in the interests of Judicial Efficiency, ignored, briefed, or they can be dropped if this Court would return them to the State Courts.

Here it is not being even disputed that I did not bring up the additional state arguments during my motion for Summary Judgment. The motion for Summary Judgment is clear and it seems to me that Judge Thompson is holding, quite incorrectly, that legal argument or theories must be brought up in the complaint or lost. Both the court and the defendants (and the Supreme Court I might add) were all clearly on notice as to what legal theories and issues and arguments I based my Summary Judgment motion on. The fact that my opposition did not chose to argue against me [and that the County did not even file a motion for Summary Judgment after I returned from the state courts] on these issues, and that the District Court did not address these matters in its opinion does not mean that they were not raised below.

The issues for adjudication are clearly stated to the Court. They are listed where they are stated to be listed (Record #66: Received: Cover letter to the Clerk and attachments [the "attachments", as you can see from the record, contain the United States Supreme Court Jurisdictional Statement]).

Case law is clear, any issue raised at Summary Judgment is fairly made and must be passed on by the Court of Appeals. The Complaint only needs inform the defendants of the general cause of action (the laws are unconstitutional). The details of the litigation need not be raised in the complaint.

10. WHY THIS COURT SHOULD HEAR THIS CASE

10.1 Conflicting Decisions

The Ninth Circuit Court of Appeals decision in this case goes against scores of cases *without discussion*. I am not saying that any court has to agree with my position but the proper way to disagree is to attack the cases that I cite and then explain why they are not applicable or why they are wrong.

The Ninth Circuit, by deciding so many issues *without discussion*, decides against me personally but then leaves the other cases as precedent for other litigants. This is a horrendous equal protection violation as I get screwed over but then other litigants can still use the other cases to their benefit.

If a case is not right or a procedure is no longer preferred then the opinion must overturn the previous decision, not completely ignore the argument.

There are two decisions in this case that are just and so incredibly unjust that there is no other conclusion than that whoever supports them are themselves criminals and have no right to claim that they represent justice. Both decisions are contained in footnote 3 of the Ninth Circuit Opinion at Page 14095.

From Ferris v. Santa Clara County, -- F.2d. -- at 14095:

> As to the first argument, we note that a plurality of the Supreme Court recently held that the "irrebuttable presumption" analysis is simply another was of framing a substantive due process claim. *See Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2340-41 (1989) (plurality opinion).

From Michael H. v. Gerald D., 109 S.Ct. 2333, 2349 (1989) ("majority" dissent):

> Five Justices agree that the flaw inhering in a conclusive presumption that terminates a constitutionally protected interest without any hearing whatsoever is a *procedural* one. See *infra*, at 2358; *post*, at 2360 (WHITE, J., dissenting); *ante*, at 2347 (STEVENS, J., concurring in judgment).

This procedural due process challenge is one of the most important, as the due process clause, the opportunity to be heard, is even stronger than strict scrutiny and can rarely be burdened.

It is insane that the Ninth Circuit quotes the opinion of Four Justices over the opinion of Five. If you five Justices: Brennan, Marshall, Blackmun, White and Stevens do not vote to hear this case when its published decision directly conflicts with your views on this critical procedural issue then you have absolutely no business to write those views in the first place.

I hope you gentlemen realize that people may end up in jail solely because they rely upon something you wrote in a decision. It is in the interests of Justice that you should always back up your own words.

The second issue is the standing issue to raise the teenagers privacy right.

From Ferris v. Santa Clara County, – F.2d. -- at 14095:

> ...As to Ferris' argument that these laws impermissibly invade the privacy rights of minor females, Ferris lacks standing to argue the constitutional rights of third parties not represented in this appeal. *See United States v. Kidder*, 869 F.2d 1328, 1335 (9th Cir. 1989).

From Planned Parenthood Ass'n v. City of Cincinnati, 822 F.2d 1390, 1394 (6th Cir. 1987):

> One of the standards relevant to this second question is the well-established principle that a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights of third parties." *Warth*, 422 U.S. at 499, 95 S. Ct. at 2205. There are exceptions to this rule, however, under which litigants have been permitted to assert the rights of third parties. There are essentially two types of cases involving jus tertii the first is where the litigants challenge statutes WHICH REGULATE THEIR ACTIVITY AND, AS A RESULT, VIOLATE THE RIGHTS OF THIRD PARTIES. PLAINTIFFS IN THIS TYPE OF CASE HAVE UNIFORMLY BEEN PERMITTED TO ASSERT THE RIGHTS OF THE AFFECTED THIRD PARTIES. See *Craig v. Boren*, 429 U.S. 190, 194-97 (1976); *Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972).

The Ninth Circuit in this case **directly** disagrees (without discussion) with the Sixth Circuit in *Planned Parenthood Ass'n v. City of Cincinnati*, with this court in *Craig v. Boren*, 429 U.S. 190, 194-97 (1976); *Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972), *Singleton v. Wulff*, 428 U.S. 106, 114-15 (1975), *see also FW/PBS, Inc. v. Dallas*, 50 CCH S. Ct. Bull. p. B443, B465, showing Jus Tertii is still a valid concept.

It also disagrees with Ninth Circuit Decisions in *Ripplinger v. Collins*, 868 F.2d 1043, 1047 (9th Cir. 1989) and *Planned Parent. of C. & N. Ariz. v. State of Ariz.*, 718 F.2d 938, 947 (9th Cir. 1983):

It also disagrees with a 9-0 Supreme Court case cited by the Ninth Circuit on the merits but which is completely ignored on this issue. It is clear that some Judges will come to a conclusion on the merits and then ignore everything that disagrees with their position *without discussion*.

From New York v. Ferber, 458 U.S. 747, 768 (1982):

> What has come to be known as the First Amendment overbreadth doctrine is one of the few exception to this principle and must be justified by "weighty countervailing policies." ... It is for this reason that we have allowed persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity...

From New York v. Ferber, 458 U.S. 747, 768 n.21 (1982):

> Overbreadth challenges are only one type of facial attack. A person whose activity may be constitutionally regulated may argue that the statue under which he is convicted is invalid on its face. *See, e.g., Terminiello v. City of Chicago*, 337 U.S. 1, 5 (1949).

Do not forget that I feel that my conduct is in fact protected, but even if not, the law should be struck down anyway as it applies to two 17 year olds, or two 15 year olds. I also have standing to challenge the law as underinclusive.

The concept that should be kept in mind is that:

A defendant in a state Criminal prosecution always has standing to raise Any constitutional argument that would result in the reversal of his conviction.

Is that theory to hard to grasp? I was convicted of having consentual sex with a 15 year old. If the law in fact violates the constitutional right of the 15 year old to engage in sex with whomever she wishes then my conviction would be overturned. How in the hell can I not have standing? This argument is beyond belief.

Why not just hold that criminal defendants don't have standing to raise *any* constitutional issue? Clearly the courts have held in many prisoner cases that someone convicted of a crime has fewer rights than other citizens. Just expand that concept to include the convicted persons right to appeal any procedural Due Process constitutional violation leading to his conviction, that way there would be less litigation by convicted citizens and the courts work load would be vastly reduced leading to increased judicial efficiency for the majority of citizens who have not been convicted of crimes.

10.2 Procedural Issues Should be Decided Here

Supreme Court Rule 10.1(c) is applicable to many issues raised in this case.

After hundreds of years of of civil rights litigation it would seem to me that the standard procedural aspects of this type of a case should be long since decided.

What is the proper way to bring up issues first raised in the State Courts after abstention in a 42 U.S.C. § 1983 action? Do all legal theories of recovery have to be brought up in the complaint or be forever lost? Are liberal amendment rules for pro se's to be enforced? Who is the burden of proof on in civil rights litigation? Is the state required to prove, by the introduction of evidence, a "compelling state interest" when laws which violate a fundamental right are challenged? Who is liable when a state law is found constitutionally infirm? What is the general procedure for deciding constitutional issues - is the strict/rational scrutiny test still valid?

All these questions can only be decided by *this* court. Its leadership in these areas should be clear and firm so that all litigants in civil rights litigation can be sure of the proper procedures for engaging in civil rights litigation.

Naturally the merit issues are also extremely important. How much privacy rights do minors have? What is the outer realm of privacy pursuant to conception? Is a flaw inhering in a conclusive presumption that terminates a constitutionally protected interest without any hearing whatsoever a *procedural* one?

10.3 This Courts Leadership is Ambiguous

Even more disturbing than the conservative leaning of this court is the fact that its opinions in the privacy areas are so fragmented that its leadership is open to question.

Looking at this courts decisions in: *Michael M. v Superior Court of Sonoma Cnty*, 450 U.S. 464, 101 S. CT. 1200 (1981); *FW/PBS, Inc. v. Dallas*, 50 CCH S. Ct. Bull. p. B443, (1990); *Michael H. v. Gerald D.*, 109 S.Ct. 2333, 2349 (1989) and *Hardwick v. Bowers* 478 U.S. 186, 106 S. Ct. 2841 (1986), one can see that these four cases (three of which were 5-4) generated fragmented opinions with almost every Justice writing independently of the others. In the rare instances when two Justices did agree on an issue they generally agreed for different reasons. The liberal dissents in these cases are so common and forceful that none of the issues raised in these cases becomes foreclosed for very long.

These types of decisions lead to needless additional litigation that is detrimental for all. It is time that the court came up with intelligent rational for deciding privacy cases. If citizens don't have privacy then hold it to be such, if they do then agree that they do. If you nine cannot form a clear consensus on this issue then how do you expect other Judges and citizens to know what is right and what is wrong?

11. Arguments on the Merits

11.1 Introduction

The State of California is totally out of Step with the rest of the nation pursuant to Statutory Rape laws. Only 7 other States have set the age at 18, and some of those allow a rebuttable presumption between 15 and 17. Eighteen other States have set the age at 15 or under and Arkansas has set it at 11 (in 1984).

The privacy challenges in this case was previously reserved by this Court which upheld the law in question on narrow Equal Protection grounds *Michael M. v Superior Court of Sonoma Cnty*, 450 U.S. 464, 101 S. Ct. 1200 (1981) at 491, footnote 5.

I think it is very interesting that the Ninth Circuit Court of Appeals did not follow this Court Pregnancy Prevention rational but rather argues that the law protects the teenager from harm. Every time a different court looks at these laws we have a different compelling state interest. Perhaps the interest is not so compelling after all if no one can agree on just what it is.

Those who I have had to argue against change their stance monotonously every time they argue, its pregnancy prevention one day, morality the next, and now "protection of the teenagers from harm". I feel only a compendious battery of deliberation will suffice against such mendacity. Qui omne dicit nihil excludit.

How do we know if these laws prevent pregnancy (if that is the Compelling State interest then the law must effect it, ipso facto). Well, by the scientific method, we compare areas which have high Statutory Rape Law ages (Such as California with 18) v. areas which has no such law (say Minnesota with a Statutory Rape Law age of 13). Thus Minn essentially has no law prohibiting sex with 13-17 year olds. If the law reduces teenaged pregnancies then California would have a lower incidence of teenaged pregnancies than Minn. But Minn has the LOWEST teenage pregnancy rate in the nation, 10.4% compared to Californias' 13.9%.

If the only factor affecting teenage pregnancy rates was the law then it would be expected that two places where the law is the same (such as two cities in the same state) would have the same teenage pregnancy rate. But Los Altos California has a LOW teenage pregnancy rate of 0.8% whereas Compton California has a HIGH teenage pregnancy rate of 25.0%. Full statistical evidence for all States is shown in the record.

These statistics surprise no one. The only factor that effects teenaged pregnancy rates is the economic health of a city. If a city has high per capita income then it has a Low pregnancy rate. If the city has a low per capita income then that city has a High teenage pregnancy rate. This rule holds throughout every city in the Nation, regardless of whether the law is 11 or 18 or anywhere in-between. Causa patet: the teenaged adolescent from a low income family (not so stupid as some would have us believe) faced with employment of $3.50 an hour vs. $500 a month welfare if she has a child decides to become pregnant simply to economically better herself. Once making that decision finding someone to impregnate her, law or no law, is fairly simple. So far this is an argument Ad quod non fuit responsum.

11.2 At least one court feels that there is a federal standard of a class of citizens known as mature minors who have full sexual privacy rights

From *Parenthood Calif. v. John Van De Kamp*, 181 Cal. 3d 245, 226 Cal. Rptr. 361 (1986).

> Against the backdrop of this constitutional tradition, the United States Supreme Court has repeatedly declared the constitutional right of sexual privacy applicable to minors. (*see Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52; *Carey v. Population Services International* 431 U.S. 678; *Akron v. Akron Center for Reproductive Health* 462 U.S. 416.) These decisions have created the "mature minor" standard, declaring that a minor of sufficient maturity to make reproductive health care decisions enjoys the same constitutional privileges as an adult, including access to contraceptives and the ability to make a decision whether or not to undergo an abortion without undue interference from the state. No minimum chronological age has been established for "maturity": the determination is made on a case-by-case basis. (see, e.g. *Bellotti v. Baird*, 443 U.S. 622).
>
> We begin our analysis of the intent of the Legislature by noting that a court engaging in statutory interpretation "should take into account matters such as context, the object in view, the evils to be remedied, [and] the history of the times" (*Cossack v. City of Los Angeles* (1974) 11 Cal.3d 726, 733,...) Whatever one may think of its wisdom or its morality, children under the age of 14 do voluntarily engage in sexual activity with some understanding of the nature of their conduct. In *People v. Cicero* (1984) 157 C.A.3d 465, the court reviewed a comprehensive report on the adolescent sexuality in the United States prepared by the Department of Health Education and Welfare. The report "collects numerous surveys of sexual experiences of adolescent Americans".
>
> The Court quoted three surveys showing that by the age of 13, upwards 20 percent of boys, and a smaller number of girls, had engaged in

intercourse...The Cicero Court concluded that "SOME CHILDREN UNDER AGE 14 ARE CAPABLE OF UNDERSTANDING SOME FORMS OF SEXUAL CONDUCT AND GIVING THEIR KNOWING CONSENT TO THEIR PARTICIPATION IN IT".

Statutes are to be construed with reference to the entire system of law of which they are a part, including the various codes, and harmonized wherever possible to achieve a reasonable result...In the Civil Code, the Legislature has provided for the medical emancipation of minors, including many under 14, by providing them the right to obtain reproductive health care and for other types of medical treatment without parental consent ...Civil Code section 34.5 gives unmarried otherwise unemancipated minors of any age the right to give independent consent to "hospital, medical and surgical care related to the prevention or treatment of pregnancy". Other statutes give similar rights of consent to minors of varying ages: section 34.7 [minors age 12 and over, right to consent to treatment for sexually transmitted diseases]; section 34.8 [minors age 12 and over, right to consent to treatment for rape]; section 34.9 [minors of any age, right to consent to treatment for sexual assault];...the Legislature has provided a privilege of medical record confidentiality personal to the minor...BY MEDICALLY EMANCIPATING THE MINORS, THE STATUTES, PARTICULARLY CIVIL CODE SECTION 34.5, SEEM TO PRESUPPOSE THE ABILITY TO CONSENT TO SEXUAL ACTIVITY.

First, THERE ARE MINORS UNDER 14 WHO ARE VOLUNTARILY ENGAGING IN SEXUAL ACTIVITY and who "urgently need health care relating to their sexual conduct." Ample statistical studies show considerable VOLUNTARY SEXUAL ACTIVITY ON THE PART OF YOUNG ADOLESCENTS, MANY UNDER THE AGE OF 14.

The California right of sexual privacy, BROADER THAN ITS FEDERAL COUNTERPART, necessarily imports the same constitutional privileges to the mature minor. Furthermore, the California Constitution guarantees the right of privacy to "all persons", a phrase necessarily including minors as California citizens...Although, evidently, no California case has

> discussed the state constitutional sexual right of minors (cf. Conservatorship of Valerie N. (1985) 40 Cal.3d 143), they readily apply to minors the general concepts of privacy...THE STATE CONSTITUTION THUS GUARANTEES AT LEAST THE MATURE MINOR, WHO MAY BE UNDER THE AGE OF 14, THE RIGHT TO SEXUAL PRIVACY.

Clearly parts of the laws in question here have already been declared unconstitutional by the state courts. See *People v. Cicero*, 157 Cal. App. 3d 465, 482, 204 Cal. Rptr. 582 (1984) and *Planned Parenthood Aff. of Calif. v. John Van De Kamp*, 181 Cal. 3d 245, 226 Cal. Rptr. 361 (1986). Consentual sex between two 13 year olds is no longer a crime in California. This court also recognizes minors privacy rights.

From *Michael M. v Superior Court of Sonoma Cnty*, 450 U.S. 464, 101 S. Ct. 1200, 1215 footnote 5 (Dissent) (1981):

> Petitioner has not questioned the State's constitutional power to achieve if asserted objective by criminalizing consensual sexual activity. I note that our cases would not foreclose such a privacy challenge.

11.3 Many Members of this Court believe that liberties that have ancient roots are fundamental

From *Hardwick v. Bowers*, 478 U.S. 186, 106 S. Ct. 2841 (1986):

> A different description of Fundamental liberties appeared in *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of POWELL, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." Id., at 503 (POWELL, J.). See also *Griswold v. Connecticut*, 381 U.S., at 506.

From Edision, The Constitutionality of Statutory Rape Laws, 27 UCLA L.Rev. 757 (1980) at 762:

> The crime of statutory rape is at least as ancient as the 4,000-year-old Code of Hammurabi. In 1275 A.D., the first English statutory rape law made it a crime to ravish any maiden under twelve years of age "neither by her own consent, nor without." A subsequent statute lowered the age of consent to ten years. According to Blackstone, the object of the statue was "not to create a new offense but to declare that a girl under the age of 10 was incapable of judgment and discretion and thus unable to give legal consent." This statute has been held to be part of the common law originally brought to the United States.
>
> At the turn of the twentieth century, some states raised the age of consent as high as eighteen or twenty-one. {To paraphrase footnote 39; the California statutory rape law was originally set at 10 in 1850, then 14 in 1889, then 16 in 1897, then 18 in 1913}.

So from 1275 (and probably sooner) to 1897 the activates that I am charged with were perfectly legal (assuming this to be in essence a Statutory Rape case). Thats a good 600 years with no discernible adverse effect to society. It was legal at Common Law and Old English Law. Clearly the legality of these activities is "deeply rooted in this Nation's history and tradition". Quae praeter consuetudinem et morem majorum fiunt neque placent neque recta videntur. Also at civil law a female was considered an adult at 12, a male at 14.

11.4 Consent v. Intent

This issue was raised in the complaint and has not even been mentioned, by anyone, after five years of litigation.

11.5 Substantive Due Process

The Ninth Circuit Court of Appeals endeavors to reduce this entire case to "it is beyond cavil that these statutes are aimed at protecting youth from physical and psychological harm as a result of specified sexual activates". There are two *major* errors in this analysis. One deals with burden of proof as to that statement and the second is that if he is applying strict scrutiny then the law must be narrowly tailored to those concerns.

11.5.1 Burden of Proof

From New York v. Ferber, 102 S.Ct. 3348, 3355 (1982):

> We shall not second-guess this legislative judgment. Respondent has not intimated that we do so. Suffice to say that virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating "child pornography." The legislative judgment as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the psychological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.

From United States v. Hicks, 625 F.2d 216 (1980), rev 657 F.2d 244, 245 (1981):

> It is clear, at least prior to *Michael M.*, that the government's burden included the production of evidence to demonstrate what the objectives of the statute are and how those objectives are substantially furthered by punishment only of the male. I do not read *Michael M.* to have changed that rule. In the case before us, the government simply failed to produce any evidence.
>
> The government merely made unsupported assertions of statutory purpose.

The Ninth Circuit Court of Appeals, relying on *Ferber*, a child pornography case which had ample proof that those aged 4 to 15 suffer when made the victims of pornography, but had no probative value at all pursuant to consentual sex with 15-17 year olds, takes the position that harm occurs when a 30 year old has consentual sex with a 15 year old with no proof whatsoever, even worse then the governments position in *Hicks*. Judge Thompson, again, ignores *Hicks* without discussion. Who is the burden of proof on? Me? The government? The Court? Is *Hicks* no longer good law? Is it not applicable? Does Judge Thompson only follow precedence when it suits him? Do we follow *Hicks* in other cases but not in this case?

Let us assume that Judge Thompson is correct. That consentual sex between a 30 year old and a 15 year old is harmful. Would a 15 year old, in a state where consentual sex

with 15 year olds is not outlawed, have a Cause of Action against a 30 year old after engaging in consentual sexual relations with that 30 year old and automatically receive damages without any showing of harm?

Were all females aged 15-17 always harmed from 1221 to about 1897 when these activates were completely legal? Is the Court holding that the entire 15-17 year old citizenry of the United States, and before it England, were psychologically and physically harmed for 600 straight years?

If there is damage that can be proven (did the female have mood changes, depression, did she see a psychologist as a result of the activities etc.) then of course the state has a compelling interest in imposing criminal sanctions. But no such harm occurred in this case, and taking one year of my life from me at gunpoint (two months in jail and at least 10 months of work fighting the case) when I have harmed no one is wrong. Notice the 15 year old prosecutrix is of the opinion that the *state* has violated her rights and caused her psychological harm, not that I did.

Burden of proof is on the state to show this harm. If it cannot then this court should follow *Hicks* and declare the laws unconstitutional. At least the issue of who shoulders the burden of proof should be clearly decided.

11.5.2 Narrowly Drawn to the Compelling Interest

From Watkins v. U.S. Army, 875 F.2d 699, 728 (9th Cir. 1989):

> Having concluded that homosexuals constitute a suspect class, I now must subject the Army's regulations facially discriminating against homosexuals to strict scrutiny. Consequently, I may uphold the regulations only if they are "*necessary* to promote a *compelling* governmental interest." *Dunn v. Blumstein*, 405 U.S. 330, 342, 92 S.Ct. 995, 1003, 31 L.Ed.2d. 274 (1972) (quoting *Shapiro*, 394 U.S. at 634, 89 S.Ct. at 1331); *see also University of Calif. Regents v. Bakke*, 438 U.S. 265, 357, 98 S.Ct. 2733, 2782, 57 L.Ed.2d. 750 (1978) (opinion of Brennan, White, Marshall & Blackmun, Judge.). The requirement of necessity means that no less restrictive alternative is available to promote the compelling governmental interest. *See Dunn*, 405 U.S. at 343, 92 S.Ct. at 1003; *Bakke*, 438 U.S. at 357, 98 S.Ct. at 2782 (Opinion of four justices).

The Ninth Circuit Court of Appeals seems to hold that even if my right is fundamental that the state has a compelling interest. At page 14097: "it is beyond cavil that these statutes are aimed at protecting youth from physical and psychological harm as a result of specified sexual activities. California has a compelling interest is safeguarding its youth in this manner."

No doubt California has a compelling interest in protecting not only its youth but all its citizens from physical or psychological harm. But there must be no less restrictive alternative available. In other words the law must be narrowly tailored to this interest.

Granted some individuals, regardless of age, may suffer psychological or physical harm from engaging in consentual sexual activities. Normal assault laws already on the books clearly prohibit *physical harm* from any act. One could even argue that for a 15-17 year old pregnancy could be a form of physical harm. Fine, outlaw pregnancy. I've not made anyone pregnant.

Psychological harm is much more difficult to establish. Does the court hold that every time a 30 year old has sex with a 15 year old that the 15 year old is automatically psychological harmed? This irrebuttable presumption is farcical.

And what of the converse, many many more people suffer depression from *not* having sex as do those who suffer from having sex. Could the state pass a law *requiring* individuals to have sex on the grounds that that state has a compelling interest in preventing the depression (physiological harm) that occurs when people do not have sex?

In *Ferber* the overbreadth of the statue was considered almost *de minimis*. Conversely here the opposite is true (for example how many people do you know, of any age, that have been physically harmed by oral copulation). The overbreadth is extremely substantial because physical and psychological harm occur very rarely in 15-17 year olds who engage in consentual sexual activities. If it were factual that 15-17 year olds are often harmed by these activities then our wise legislatures in *every* state would prohibit these activates, but at least half the states do not.

The Court just seems to overlook the fact that these acts are *consentual*, rarely do people consent to do something which is harmful to them. Why would a 15 year old consent to an act that is harmful to her? Once they find that sex is physically pleasurable (in fact the exact opposite of harm) and that it is, 99%+ of the time, enjoyable and psychologically beneficial, they consent. Few would argue that a 30 year old does not physically and mentally benefit from a sexual encounter, why would a 15 year old not similarly benefit? For example if a 30 year old benefits from exercise and a diet low in fats would not a 15 year old also benefit from the same?

There are some instances when the participate does not benefit but that does not mean the state can prohibit *all* acts and infringe upon the rights of those (99%+) who do benefit. Does society prohibit individuals from driving because sometimes driving leads to accidents? Does society criminalize smoking even though it is always physically harmful?

This case is totally one of morality - the physical and mental harm argument is so specious it would not convince a potted plant (why else does Judge Thompson not require the state to produce evidence in this case? - There is none to produce). I have not harmed anyone - it is just not right that I be subjected to violence based on the way someone else believes I, or Brenda, should live. Others have a right to try and verbally convince me and Brenda that they are right and we are wrong but they do not have a right to put a gun to our head when we take no action to harm them or each other. These laws can easily be written to prohibit mental and physical harm by simply requiring that no prosecution would be allowed absent *proof* of harm.

If strict scrutiny were applied, these laws would fail as they are not narrowly tailored to the compelling state interest. And no one has proved any compelling state interest with any evidence as of yet.

11.6 Invidious Prosecution

My argument is simply that this law is so rarely prosecuted in relation to the number of times that it is violated, that anyone prosecuted under is invidiously prosecuted.

11.7 Too wide a variance in laws from state to state

Judge Thompson states "This argument is patently frivolous and merits no discussion". I would appreciate if the court would add to that statement: "Even though, when Ferris was arrested, the statutory rape age in the state of Arkansas was 11."

11.9 Striking of Second Amended Complaint

I don't really see what is so "liberally construed" about allowing only one amendment.

From S. Childress, Standards of Review (1986) at 284:

> Factors justifying a discretionary denial of leave to amend include prejudice to the opponent, undue delay and dilatory motive, bad faith, repeated failure to cure deficiencies, and the futility of amendment (as where no legal basis exists for the amended claim or defense). Citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971).

None of the above factors are present in this case. Yet another example of precedence not discussed in the opinion.

12.0 Conclusion

There is no way that the Ninth Circuit Court of Appeals decision in this case should stand. These issues are important enough for this court to decide and it is this court alone that should decide them. It is stupid that the procedural aspects of civil rights litigation are so unclear that 60% of this case was thrown out for no reason.

I have been screwed by every court I have taken this case in front of. If citizens do not have the right of privacy then you should say so to save others form wasting time on these kinds of appeals. I have spent a good 10 months out of my life on this case, because I relied on the words of this court and of others. If you lack the guts to support your theories and beliefs then save everyone's time by not saying them.

This court should get its act together by forming a cohesive method, agreeable to all the members of this body, for deciding privacy cases so that everyone would know if their activities are protect by the constitution or not, and otherwise honest citizens like me don't have to take a wild guess if they are violating a law that is or is not unconstitutional.

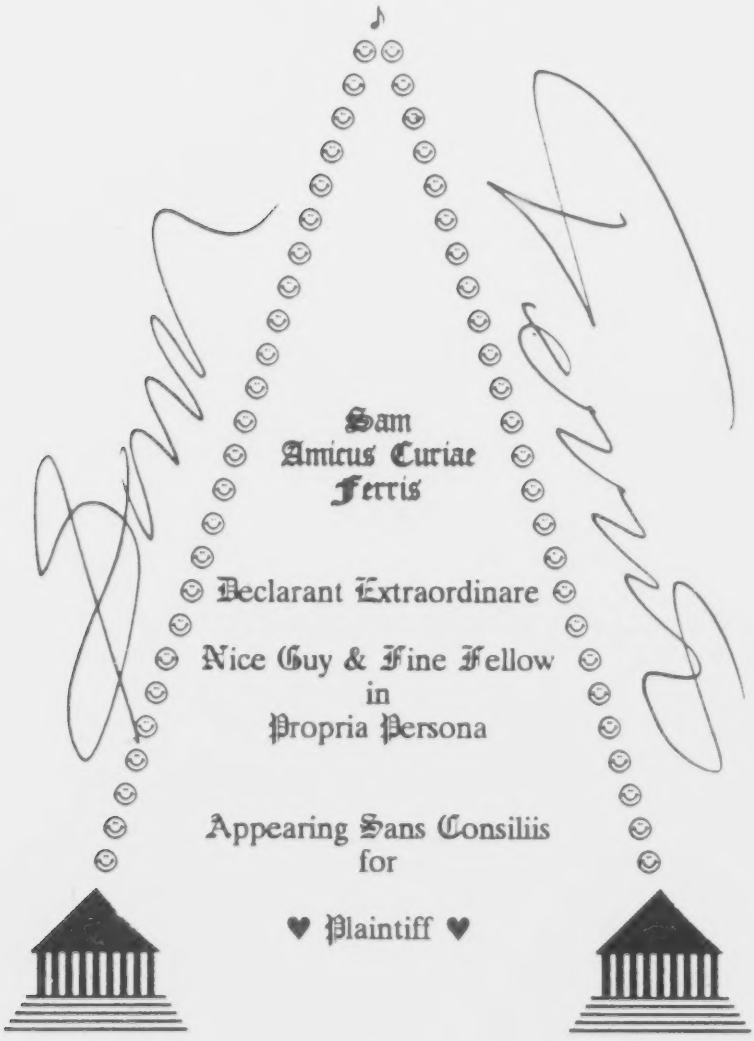
Declaration of Sam Ferris

I declare under penalty of perjury that any fact issues or statements made by me above or in any paper, filed by me in this case, or in any case, that I have first hand knowledge of is true and correct to the best of my ability and memory to determine its truthfulness and all other information is true and correct by information and belief.

Executed on;

5-8-20

Respectfully Submitted and Executed By;



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APPENDIX A

PUBLISHED FINAL OPINION

OF THE NINTH CIRCUIT COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAM FERRIS, *Petitioner/ Plaintiff-Appellant,* v. SANTA CLARA COUNTY; CITY OF SAN JOSE; OFFICER MASON; OFFICER GALEA; STATE OF CALIFORNIA, *Defendants-Appellees.*	No. 88-15207 D.C. No. CV-84-20449-WAI OPINION

Appeal from the United States District Court
for the Northern District of California
William A. Ingram, Chief District Judge, Presiding

Submitted June 28, 1989*
San Francisco, California

Filed December 6, 1989

Before: James R. Browning, Harry Pregerson and David R. Thompson, Circuit Judges.

Opinion by Judge Thompson

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

SUMMARY

Civil Rights/Constitutional Law

Affirming the district court's grant of summary judgment in an action for injunctive relief and damages under 42 U.S.C. § 1983, the court held that California laws proscribing certain sexual activities with minors are not unconstitutional.

Appellant Sam Ferris appealed pro se the district court's grant of summary judgment, alleging that his civil rights were violated when he was arrested and convicted under state laws that proscribe certain sexual activities with minors. Ferris contended that the statutes are unconstitutional.

[1] Ferris argued that the statutes under which he was convicted deny him substantive due process because they violate his right to engage in consensual sexual activities with females between the ages of fourteen and eighteen, in essence that he has a privacy right protected by the Constitution to engage in this conduct. [2] Even assuming that Ferris may have this constitutional right, the State may nevertheless regulate this conduct insofar as it pertains to minors. [3] These statutes are aimed at protecting youth from physical and psychological harm as a result of specified sexual activities, and California has a compelling interest in safeguarding its youth in this manner. [4] Ferris's claims that the statutes violate the equal protection clause because they set a different relevant age from the laws of other states resulting in uneven prosecution is patently frivolous and without merit, [5] as is the argument that Pen. Code § 261.5 violates the equal protection clause because it subjects only males to criminal penalties. The Supreme Court considered and rejected an identical contention in *Michael M. v. Superior Court*, 450 U.S. 464 (1981). [6] Ferris's argument that the statutes are unconstitutionally vague in their sentencing provisions is also without merit. Sections 264 and 288a of the Penal Code plainly set out the

maximum punishments for each of the statutes under which Ferris was convicted.

COUNSEL

Sam Ferris, pro se, San Jose, California, for the plaintiff-appellant.

James Rumble, Deputy County Counsel, San Jose, California, for the defendant-appellee County of Santa Clara.

Andrea Bryan Ferguson, Senior Deputy City Attorney, San Jose, California, for the defendants-appellees City of San Jose, and Officers Galea and Mason.

OPINION

THOMPSON, Circuit Judge:

Appellant Sam Ferris appeals pro se the district court's grant of summary judgment in an action for injunctive relief and damages under 42 U.S.C. § 1983. Ferris alleged his civil rights were violated when he was arrested and convicted under state laws that proscribe certain sexual activities with minors. Ferris contends the statutes are unconstitutional and that the district court erred in striking his proposed second amended complaint. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

FACTS

Ferris was arrested and charged with violating California Penal Code §§ 261.5 (one count), 288a(b)(1) (four counts), and 288a(b)(2) (two counts).[1] Ferris entered a plea of *nolo*

[1]Section 261.5 provides:

Unlawful sexual intercourse is an act of sexual intercourse

contendere to all charges. He was sentenced to six months in the County jail and placed on probation. All charges resulted from Ferris' relations with two minor females, aged fifteen and seventeen. He contends his arrest and convictions violated his civil rights because, he argues, California Penal Code §§ 261.5, 288a(b)(1), and 288a(b)(2) are unconstitutional. Ferris sued the State of California ("State"), the County of Santa Clara ("County"), the City of San Jose ("City"), and two police officers. He sought damages and an injunction enjoining enforcement of the challenged statutes.

The district court granted the State's motion to dismiss under the doctrine of sovereign immunity. It dismissed the action against the two police officers after determining they were qualifiedly immune from suit. The court then dismissed the action against the County and City with leave to amend, instructing Ferris that he had to allege a County or City "policy, custom or practice" that caused him to be deprived of a right protected by the Constitution or by federal law.

Ferris filed an amended complaint in which he repeated his allegation that his constitutional rights were violated by enforcement of the state laws under which he was convicted. The district court then dismissed the action with prejudice. It

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accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years.

Subsections (1) and (2) of section 288a(b) provide:

(b)(1) Except as provided in Section 288, any person who participates in an act of oral copulation with another person who is under 18 years of age shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year.

(2) Except as provided in Section 288, any person over the age of 21 years who participates in an act of oral copulation with another person who is under 16 years of age shall be guilty of a felony.

concluded Ferris had not stated a section 1983 claim against the County or the City because he had not alleged that the claimed constitutional violation was caused by the implementation of a municipal "policy, custom or practice" under *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). The district court also determined, in the alternative, that the statutes in question were constitutional, and therefore no constitutional violation had occurred. After final judgment was entered and the action was dismissed, Ferris filed a second amended complaint in which he added federal racketeering claims. The district court ordered the second amended complaint stricken.

ANALYSIS

A. *Constitutionality*

Ferris makes six arguments to show facial unconstitutionality.[2] Of these six, we address only Ferris' substantive due process, equal protection, and illegal sentence contentions.[3]

---

[2]Ferris also contends the statutes are unconstitutional as applied. He argues that "no one in the State of California has ever been charged with a Pure [sic] violation of these laws except me." Appellant's Brief at 40. We construe this as a claim of selective prosecution. It fails because Ferris has set forth no facts to support his conclusory allegation.

[3]We do not address Ferris' arguments (1) that the statutes in question are unconstitutional on the ground that they violate procedural due process by creating an irrebutable presumption that females under certain ages are incapable of consenting to the sexual activities proscribed by the statutes and (2) that the statutes in question violate the privacy rights of minor females between the ages of fourteen and eighteen to engage in the specified sexual activities. As to the first argument, we note that a plurality of the Supreme Court recently held that the "irrebutable presumption" analysis is simply another way of framing a substantive due process claim. *See Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2340-41 (1989) (plurality opinion). As to Ferris' argument that these laws impermissibly invade the privacy rights of minor females, Ferris lacks standing to argue the constitutional rights of third parties not represented in this appeal. *See United States v. Kidder*, 869 F.2d 1328, 1335 (9th Cir. 1989).

1. *Substantive Due Process*

[1] Ferris argues that the statutes under which he was convicted deny him substantive due process, because they violate his right to engage in consensual sexual activities with females between the ages of fourteen and eighteen. In essence, Ferris argues he has a privacy right protected by the Constitution to engage in this conduct.

[2] Even if we assume that Ferris may have a constitutional right to engage in consensual sexual activities with females, the State may nonetheless regulate this conduct insofar as it pertains to minors.

> It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 607 (1982). "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince v. Massachusetts,* 321 U.S. 158, 168 (1944). Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. In *Prince v. Massachusetts, supra,* the Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First Amendment activity. In *Ginsberg v. New York,* [390 U.S. 629 (1968)], we sustained a New York law protecting children from exposure to nonobscene literature. Most recently, we held that the Government's interest in the "well-being of its youth" justified special treatment of indecent broadcasting received by adults as well as children. *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978).

New York v. Ferber, 458 U.S. 747, 756-57 (1982).

[3] In *Ferber*, the Court stated that because the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance," *id.* at 757, New York could prohibit the sale of pornographic materials depicting minors, even though such materials were not obscene. Although California Penal Code §§ 261.5, 288a(b)(1), and 288a(b)(2) are not aimed at the sexual exploitation of minors in the context of pornography, it is beyond cavil that these statutes are aimed at protecting youth from physical and psychological harm as a result of specified sexual activities. California has a compelling interest in safeguarding its youth in this manner. Thus, California Penal Code §§ 261.5, 288a(b)(1), and 288a(b)(2) do not violate any right of privacy which Ferris may have under the fourteenth amendment.

2. *Equal Protection Claims*

[4] Ferris claims that California Penal Code §§ 261.5, 288a(b)(1), and 288a(b)(2) violate the equal protection clause of the fourteenth amendment because these statutes set a different relevant age than do laws of other states in proscribing sexual activities with minors. He contends that this results in uneven prosecution under similar state laws throughout the country. This argument is patently frivolous and merits no discussion.

[5] Ferris also argues that section 261.5 violates the equal protection clause because it subjects only males to criminal penalties. The Supreme Court considered and rejected an identical contention in *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (plurality opinion).

3. *Sentencing Provisions*

[6] Ferris argues that the subject statutes are unconstitutionally vague in their sentencing provisions. This argument

is meritless. Sections 264 and 288a of the California Penal Code plainly set out the maximum punishments for violation of each of the statutes under which Ferris was convicted. A statute is impermissibly vague only if people "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). The sentencing provisions of the subject statutes are not impermissibly vague.

4. *Conclusion as to Constitutionality*

We conclude that California Penal Code §§ 261.5, 288a(b)(1), and 288a(b)(2) are constitutional. Thus, there was no constitutional violation resulting from Ferris' conviction or sentence. He has failed to show that he was deprived of any right protected by the United States Constitution or federal law. *See* 42 U.S.C. § 1983.[4]

B. *Order Striking Second Amended Complaint*

Final judgment was entered July 14, 1988. Ferris filed his second amended complaint August 3, 1988. The district court ordered the second amended complaint stricken August 4, 1988. Ferris argues the court erred in striking the second amended complaint rather than granting him leave to file it.

Leave to amend following summary judgment may be granted at the discretion of the court. *Nguyen v. United States*, 792 F.2d 1500, 1503 (9th Cir. 1986). Where a final judgment is entered and an action is dismissed, amendments to pleadings may be made only with leave of court. Fed. R. Civ. P. 15(a); *Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987).

[4]Having concluded that the statutes under which Ferris was convicted are constitutional, we need not consider the qualified immunity issue as it applies to the individual defendants, the municipal policy issue as it applies to the City and County, or the eleventh amendment issue as it applies to the state's claim of sovereign immunity.

Amendments under Rule 15 are favored " 'to facilitate decision on the merits.' " *Eldridge v. Block*, 832 F.2d 1132, 1135 (9th Cir. 1987) (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)). This policy is liberally construed when applied to pro se plaintiffs. *Id.* Ferris, however, already had filed one amended complaint prior to the grant of summary judgment and entry of final judgment. His amended complaint failed to cure the defect the court had told him about. Ferris' second amended complaint purported to add an entirely new RICO claim. The district court did not abuse its discretion in striking the second amended complaint.

C. *Issues Raised for First Time on Appeal*

Ferris raises numerous other issues in his brief which were raised in state court but not presented to the district court.[5] Issues not raised in the district court will not be heard on appeal absent a showing that review is necessary to prevent a miscarriage of justice, that a change in the law has created a new issue pending appeal, or that the issue is purely one of law. *Jovanovich v. United States*, 813 F.2d 1035, 1037 (9th Cir. 1987). None of these exceptions applies in this case.

AFFIRMED.

[5]In arguing these issues, Ferris contends state judges are biased due to the election process; the subject laws are unconstitutional because married persons and persons over eighteen are not prosecuted; pro se litigants should be paid regardless of the outcome of the case; "private prostitution" should be legalized; and the state law regulating who may take the state bar examination violates due process and equal protection rights. He also contends the state appellate court erred in not publishing its decision.

APPENDIX B

ORDER OF THE NINTH CIRCUIT
BEING APPEALED DENYING ADDITION
OF STATE COURT PROSECUTRIX
AS A PLAINTIFF FOR STANDING

United States Court of Appeals

For the Ninth Circuit

Sam Ferris,	}	CA #: 88-15207
	}	DC #: CV-84-20449 WAI
Plaintiff - Appellant	}	Northern California
	}	(San Jose)
-vs.-	}	
	}	Order
County of Santa Clara,	}	of
City of San Jose,	}	November 1, 1989
Officers Mason & Galea	}	
State of California	}	
	}	
Defendants - Appellees	}	
	}	

Before: FLETCHER and THOMPSON, Circuit Judges

Appellant's motion for the addition of a new plaintiff is denied

CR CAL 10/28/88

APPENDIX C

ORDER OF THE NINTH CIRCUIT

DENYING REHEARING

United States Court of Appeals

For the Ninth Circuit

Sam Ferris, Petitioner/ Plaintiff - Appellant -vs.- County of Santa Clara, City of San Jose, Officers Mason & Galea State of California Defendants - Appellees	}	CA #: 88-15207 DC #: CV-84-20449 WAI Order of March 16, 1990

Before: BROWNING, PREGERSON and THOMPSON, Circuit Judges

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

APPENDIX D

LIST OF OTHER ON POINT

AUTHORITIES

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Declaration of Service by Mail

District Court Case #; CV-84-20449 WAI

Ninth Circuit Court Case #; 88-15207

I am a citizen of the United States and a resident of the County of Santa Clara.

I am over the age of eighteen years and not a party to the within action.

My address is 3908 Arden Farms Place, San Jose, California 95111.

I served a true copy of:

Petition for Writ of Certiorari

by placing it in an envelope addressed to:

County Gov. Center
Ninth Floor, East Wing
70 West Hedding Street
San Jose, Calif 95110
Attention:
Donald L. Clark, County Counsel &
James Rumble, Deputy County Counsel

Joan R. Gallo, City Attorney
Andrea Bryan Ferguson
Deputy City Attorney
151 West Mission Street
San Jose, Calif 95110

The envelope was then sealed and postage fully prepaid thereupon and was, maybe after 5:00 p.m. on: 5/12/90 deposited in the United States mail at San Jose, California.

I declare under penalty of perjury that the foregoing is true and correct and was executed at San Jose, Calif, on: 5/12/90. By;

M A Ferris

M. A. Ferris - Declarant